80-1350

No. .....

Office-Supreme Court, U.S.
FILED
FEB 9 1981
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,

Petitioner,

vs.

CITY OF BOULDER, COLORADO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF FOR THE STATE OF COLORADO IN SUPPORT OF THE PETITIONER

J. D. MacFARLANE
Attorney General
RICHARD F. HENNESSEY
Deputy Attorney General
MARY J. MULLARKEY
Solicitor General
B. LAWRENCE THEIS
First Assistant Attorney General
Antitrust Section
THOMAS P. McMAHON
Assistant Attorney General
Antitrust Section
Counsel of Record
Attorneys for *Amicus Curiae*
1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 839-3611

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED FOR REVIEW

Is the mere exercise of general home rule governing power by municipalities the equivalent of "state" action which is *by itself* sufficient to qualify for federal antitrust immunity?

TABLE OF CONTENTS

Pages

Question Presented For Review i

Table of Contents ii

Table of Authorities v

Interest of *Amicus Curiae* 1

Reasons for Granting Writ:

I. The instant case presents the issue of state action immunity for home rule municipalities, an important question of federal law which has not previously been decided by this Court. 2

A. The Tenth Circuit's decision and its necessary effects directly conflict with the holding and rationale of a majority of the Supreme Court in *City of Lafayette.* 3

B. The lower federal courts are split on the applicability of *City of Lafayette* to home rule municipalities. 5

II. The Tenth Circuit has disregarded this Court's teaching in *City of Lafayette* with respect to state action immunity for municipalities. 8

A. The Tenth Circuit's decision directly conflicts with the plurality opinion of the Supreme Court in *City of Lafayette.* 8

B. The Colorado Constitution's grant of general home rule governing power to Colorado municipalities does not evidence contemplation by the State of Colorado that such power may be used in an anti-competitive fashion. 16

TABLE OF CONTENTS—Continued

Pages

III. The Tenth Circuit has established an erroneous precedent by misapplying the state action immunity tests established by this Court for all subordinate governmental entities. 13

A. The State of Colorado has no specific policy with respect to cable television and does not exercise supervisory power over that subject matter area. 14

B. The Colorado Constitution's grant of general home rule governing power to Colorado municipalities does not evidence contemplation by the State of Colorado that such power may be used in an anti-competitive fashion. 16

Conclusion 19

Appendices

Appendix A: Colorado Restraint of Trade and Commerce (Antitrust) Act, Colo. Rev. Stat. 1973, §§ 6-4-101, *et seq.* ..... App. 1

Appendix B: List of Home Rule Municipalities in Colorado ..... App. 5

Appendix C: List of Home Rule Municipalities in Oklahoma ..... App. 6

Appendix D: List of Home Rule Municipalities in Wyoming ..... App. 8

Appendix E: Colo. Const. art. XX, sec. 6 ..... App. 10

Appendix F: Colo. Const. art. XX, sec. 1 ..... App. 14

TABLE OF CONTENTS—Continued

Pages

Appendix G: Boulder, Colorado, City Ordinance No. 2846 (Oct. 6, 1964) ..... App. 17

Appendix H: Boulder, Colorado, City Ordinance No. 4472 (Jan. 1, 1980) ..... App. 23

Appendix I: Boulder, Colorado, City Ordinance No. 4473 (Dec. 18, 1979) ..... App. 32

Appendix J: Boulder, Colorado, City Ordinance No. 4515 (Jul. 22, 1980) ..... App. 38

Appendix K: *United States v. Columbia Pictures Industries,* 996 Antitrust & Trade Reg. Rep. (BNA) A-7 (S. D. N. Y. Dec. 31, 1980), No. 80 Civ. 4438 (GLG) slip op. p. 5 ..... App. 46

TABLE OF AUTHORITIES

Pages

Cases

Bates v. State Bar of Arizona, 433 U. S. 350 (1977) 13

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U. S. 97 (1980) 4, 8, 11, 12, 13, 14, 15

Cantor v. Detroit Edison Co., 428 U. S. 579 (1976) 4, 13

Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority, 475 F. Supp. 711 (D. D. C. 1979), *aff'd mem.*, No. 79-1658 (D. C. Cir. Jul. 3, 1980), *petition for cert. filed*, 49 U. S. L. W. 3429 (U. S. Nov. 25, 1980) 9

Cedar-Riverside Associates v. United States, 459 F. Supp. 1290 (D. Minn. 1978), *aff'd on other grounds sub nom. Cedar-Riverside Associates v. City of Minneapolis*, 606 F. 2d 254 (8th Cir. 1979) 9, 12

City of Lafayette v. Louisiana Power & Light Co., 435 U. S. 389 (1978) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19

City of Mishawaka v. American Electric Power Co., 465 F. Supp. 1320 (N. D. Ind. 1979), *aff'd in part, rev'd. in part*, 616 F. 2d 976 (7th Cir.), *cert. denied*, 49 U. S. L. W. 3481 (U. S. Jan. 12, 1981) 9, 12

Community Communications Co. v. City of Boulder, 630 F. 2d 704 (10th Cir. 1980) 3, 15

Feminist Women's Health Center, Inc. v. Mohammad, 586 F. 2d 530 (5th Cir. 1978), *cert. denied*, 100 S. Ct. 262 (1979) 14

TABLE OF AUTHORITIES—Continued

Pages

Garten Enterprises, Inc. v. City of Kansas City, 549 P. 2d 864 (Kan. 1976) 4

Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N. D. Ohio 1979), *appeal docketed sub nom. Hybud Equipment Corp. v. City of Akron*, No. 80-3121 (6th Cir. Jan. 14, 1980) 6, 8, 9, 12, 16, 18

Goldfarb v. Virginia State Bar, 421 U. S. 773 (1975) 4, 13

Gulf States Utilities Co. v. FPC, 411 U. S. 747 (1973) 19

Guthrie v. Genesee County, 494 F. Supp. 950 (W. D. N. Y. 1980) 7, 14

Highfield Water Co. v. Public Service Commission, 488 F. Supp. 1176 (D. Md. 1980) 9, 12, 14

In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (N. D. Cal. 1979) 4, 6, 12, 14, 17, 18

In re Mountain States Telephone & Telegraph Co., 73 P. U. R. 3d 161 (Colo. Pub. Util. Comm'n 1968) 14

Lee v. Norick, 447 P. 2d 1015 (Okla. 1968) 3

Manor Vail Condominium Association v. Town of Manor Vail, — Colo. —, 604 P. 2d 1168 (1980) 17, 18

Mason City Center Associates v. City of Mason City, 468 F. Supp. 737 (N. D. Iowa 1979) 6, 12, 14, 15

National Society of Professional Engineers v. United States, 435 U. S. 679 (1978) 2

New Motor Vehicle Board v. Orrin W. Fox Co., 439 U. S. 96 (1978) 8, 11, 12

TABLE OF AUTHORITIES—Continued

Pages

Northern Pacific Railway v. United States, 356 U. S. 1 (1958) 2

Nugent v. City of East Providence, 238 A. 2d 758 (R. I. 1968) 16

Parker v. Brown, 317 U. S. 341 (1943) 2, 7, 9, 13, 16, 19

Pinehurst Airlines, Inc. v. Resort Air Services, Inc., 476 F. Supp. 543 (M. D. N. C. 1979) 7, 13, 14

Princeton Community Phone Book, Inc. v. Bate, 582 F. 2d 706 (3d Cir.), *cert. denied*, 439 U. S. 966 (1978) 9

Pueblo Aircraft Service, Inc. v. City of Pueblo, 498 F. Supp. 1205 (D. Colo.), *appeal docketed*, No. 80-2083 (10th Cir. Oct. 16, 1980) 5, 7, 9, 12, 18

Shrader v. Horton, 471 F. Supp. 1236 (W. D. Va. 1979), *aff'd per curiam*, 626 F. 2d 1163 (4th Cir. 1980) 4, 9, 12

Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority, 451 F. Supp. 157 (S. D. N. Y. 1978) 14

Stauffer v. Town of Grand Lake, 987 Antitrust & Trade Reg. Rep. (BNA) A-9 (D. Colo. Oct. 9, 1980) 7, 12, 14

Tri-County Electric Association v. City of Gillette, 584 P. 2d 995 (Wyo. 1978) 4

TV Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam*, 396 U. S. 556 (1970) 16

TABLE OF AUTHORITIES—Continued

Pages

United States v. Columbia Pictures Industries, 996 Antitrust & Trade Reg. Rep. (BNA) A-7 (S. D. N. Y. Dec. 31, 1980) 19

United States v. Southern Motor Carriers Rate Conference, 467 F. Supp. 471 (N. D. Ga. 1979) 9

United States v. Southwestern Cable Co., 392 U. S. 157 (1968) 16

United States v. Texas State Board of Public Accountancy, 464 F. Supp. 400 (W. D. Tex. 1978), *aff'd per curiam*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979) 12, 14

United States v. Topco Associates, 405 U. S. 596 (1972) 1

Whitworth v. Perkins, 559 F. 2d 378 (5th Cir. 1977), *vacated and remanded sub nom. City of Impact v. Whitworth*, 435 U. S. 992, *reinstated on remand*, 576 F. 2d 696 (1978), *cert. denied*, 440 U. S. 911 (1979) 12

Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N. D. Tex. 1978) 4, 6, 7, 18

CONSTITUTIONAL PROVISIONS

Colo. Const. art. XX, sec. 1 ..... 16, 17, App. 12

Colo. Const. art. XX, sec. 6 ..... 16, 17, 18, App. 8

Kan. Const. art. XII, sec. 5 4

Okla. Const. art. XVIII, sec. 3 (a) 3

Wyo. Const. art. XIII, sec. 1 4

TABLE OF AUTHORITIES—Continued

Pages

STATUTES

Colo. Rev. Stat. 1973, §§ 6-4-101 *et seq.* ..... 1, 15, App. 1-4

ORDINANCES

Boulder, Colorado, City Ordinance No. 2846 (Oct. 6, 1964) ..... 17, App. 14, 21, 22, 40, 41

Boulder, Colorado, City Ordinance No. 4472 (Jan. 1, 1980) ..... 17, App. 20, 38

Boulder, Colorado, City Ordinance No. 4473 (Dec. 18, 1979) ..... 17, App. 29, 38

Boulder, Colorado, City Ordinance No. 4515 (Jul. 22, 1980) ..... 17, App. 35

OTHER AUTHORITIES

League of Kansas Municipalities, Information for Kansas Officials (1979) 4

Vanlandingham, *Constitutional-Municipal Home Rule Since the AMA (NLC) Model*, 17 Wm. & Mary L. Rev. 1 (1975) 4

No. .....

In The

Supreme Court of the United States

October Term, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,

Petitioner,

vs.

CITY OF BOULDER, COLORADO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF FOR THE STATE OF COLORADO IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS CURIAE

As "the Magna Carta of free enterprise," the antitrust laws are fundamental to the preservation of the American competitive economic system. *United States v. Topco Associates,* 405 U.S. 596, 610 (1972). Accordingly, Colorado has enacted an antitrust law to ensure free and open competition within the state. Colo. Rev. Stat. 1973, §§ 6-4-101 *et seq.* (attached hereto as Appendix A). The effect of the antitrust laws in Colorado is to encourage better allocation of resources, greater economic efficiency, lower consumer prices, higher product quality and greater material progress, all to the benefit of the

citizens of Colorado. *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978); *Northern Pacific Railway v. United States*, 356 U.S. 1, 4 (1958).

The instant case constitutes an extremely significant precedent with respect to competition in the State of Colorado. The impact of the Tenth Circuit's ruling on state action immunity is not limited just to the city of Boulder, Colorado, or the subject of cable television. Rather, the direct effect of that decision extends to the insulation of *all* Colorado municipalities from the operation of the antitrust laws when exercising home rule powers in *any* subject-matter area which is even arguably local in nature. Consequently, the interest of Colorado's citizens in the development and preservation of a competitive environment within the state has been thwarted by the decision of the court below.

REASONS FOR GRANTING WRIT

I. The instant case presents the issue of state action immunity for home rule municipalities, an important question of federal law which has not previously been decided by this Court.

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the Supreme Court specifically considered whether the antitrust laws apply to municipalities. A majority of the Court there ruled that cities do not automatically have antitrust immunity under *Parker v. Brown*, 317 U.S. 341 (1943), just because they are governmental entities. This Court has not heretofore expressly decided whether its holding in *City of Lafayette*, which involved non-home rule cities, applies to home rule municipalities as well. However, the court below has

decided that question in the case at hand, and it has done so in a manner which directly contravenes the principles set forth by a majority of the Supreme Court in *Lafayette*. Moreover, the several federal district courts which have considered the issue are split in their conclusions. Accordingly, *certiorari* should be granted in the instant case in order that this Court may explicate the state action immunity principles applicable to home rule municipalities.

A. The Tenth Circuit's decision and its necessary effects directly conflict with the holding and rationale of a majority of the Supreme Court in City of Lafayette.

In this case the court below held in essence that, as a home rule municipality, the city of Boulder, Colorado, has state action immunity from the antitrust laws in connection with its regulation of cable television. *Community Communications Co. v. City of Boulder*, 630 F. 2d 704 (10th Cir. 1980). Just within the Tenth Circuit alone, that opinion is of enormous significance. First and foremost, it ensures the "absolute immunity of [all 55 other constitutional home rule] Colorado cities[1] from the Sherman Act." *Id.* at 711 n. 2 (Markey, C. J., dissenting). The ruling does the same for Oklahoma's 79 constitutional home rule municipalities[2] which, like Colorado's, are empowered on purely local matters to enact ordinances superseding conflicting state laws.[3] The decision also has the same effect with respect to Kansas' 625 and

---

1 *See* List of Home Rule Municipalities in Colorado (attached hereto as Appendix B).

2 *See* List of Home Rule Municipalities in Oklahoma (attached hereto as Appendix C).

3 *Lee v. Norick*, 447 P. 2d 1015 (Okla. 1968). *See* Okla. Const. art. XVIII, sec. 3(a).

Wyoming's 90 constitutional home rule cities[4] in situations where, as here, the city ordinance in question does not conflict with state statutes and the cities therefore have the same power over local matters as do the state legislatures.[5] Inasmuch as the constitutions of at least thirty-six other states also contain provisions for home rule,[6] many thousands more home rule cities in the other ten circuits across the nation undoubtedly fall into the above categories as well.

The creation of such automatic antitrust immunity for home rule cities runs directly counter to the holding by a majority of this Court in *City of Lafayette*. Likewise, it conflicts with the trend established in recent Supreme Court decisions significantly tightening the requirements for, and limiting, state action immunity.[7] *See, e.g., California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

Moreover, if allowed to stand, the clear effect of the Tenth Circuit's ruling would be to fundamentally disrupt

---

4 See League of Kansas Municipalities, Information for Kansas Officials 7-12 (1979), and List of Home Rule Municipalities in Wyoming (attached hereto as Appendix D), respectively.

5 Kan. Const. art. XII, sec. 5, and Wyo. Const. art. XIII, sec. 1, respectively. *See Garten Enterprises, Inc. v. City of Kansas City*, 549 P. 2d 864 (Kan. 1976). *Cf. Tri-County Elec. Ass'n v. City of Gillette*, 584 P. 2d 995 (Wyo. 1978) (legislature has power over municipal corporations except as provided in constitutional home rule provision).

6 Vanlandingham, *Constitutional-Municipal Home Rule Since the AMA (NLC) Model*, 17 Wm. & Mary L. Rev. 1, 4 n. 9 (1975).

7 The limiting effect of *City of Lafayette* in particular has been expressly recognized by certain of the lower federal courts. *See, e. g., In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. 1072, 1088 (N. D. Cal. 1979); *Shrader v. Horton*, 471 F. Supp. 1236, 1241 (W. D. Va. 1979), *aff'd per curiam*, 626 F. 2d 1163 (4th Cir. 1980); *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1029 (N. D. Tex. 1978).

the operation of the antitrust laws by enabling thousands of cities across the country freely to disregard the anti-competitive effects of their actions. This is exactly the result which a majority of this Court sought to avoid with its holding in *Lafayette*. *See* 435 U. S. at 408.

Home rule municipalities were not excepted from the majority's rationale and conclusion in *City of Lafayette*, and logically should not be. Whether this country's tens of thousands of local government units possess home rule powers, and the breadth of those powers, makes absolutely no difference in terms of the potential posed by those entities for impairment of the national "regime of competition [which is] . . . the fundamental principle governing commerce in this country." *Id.* at 398. Accordingly, the *Lafayette* majority's holding and rationale apply with equal force and effect to home rule cities, contrary to the decision of the Tenth Circuit here.

B. The lower federal courts are split on the applicability of City of Lafayette to home rule municipalities.

The Tenth Circuit's decision in the instant case has given impetus to a developing trend in the lower federal courts. Relying on that ruling, another Colorado federal court has recently held that the exercise of municipal policy by the home rule city of Pueblo, Colorado (in connection with its ownership and operation of a municipal airport), is the equivalent of state action and so qualifies for antitrust immunity. *Pueblo Aircraft Service, Inc. v. City of Pueblo*, 498 F. Supp. 1205, 1210 (D. Colo.), *appeal docketed*, No. 80-2083 (10th Cir. Oct. 16, 1980). Such view has not been restricted just to the federal courts in Colorado, however. An Ohio federal court has similarly found the city of Akron to have state action immunity from the anti-

trust laws (in connection with its operation of a solid waste disposal facility) because it is a home rule municipality which exercises sovereign powers within its borders and so is equivalent to the state. *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. 671, 677-78 (N. D. Ohio 1979), *appeal docketed sub nom. Hybud Equipment Corp. v. City of Akron*, No. 80-3121 (6th Cir. Jan. 14, 1980).

Not surprisingly, the courts in those three cases all conveniently ignored the rationale on which the majority holding in *City of Lafayette* was based. On the other hand, two of the three lower federal courts which had previously determined that home rule municipalities do not automatically have antitrust immunity expressly relied on the *Lafayette* majority's rationale in reaching that conclusion. *See In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. 1072, 1088 (N. D. Cal. 1979); *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1032 (N. D. Tex. 1978). Moreover, the third court expressly noted that its analytical reliance on *Lafayette*, which included reference to the majority's rationale, would be unchanged regardless of the existence of home rule powers. *See Mason City Center Associates v. City of Mason City*, 468 F. Supp. 737, 743, 744 n. 8 (N. D. Iowa 1979).

To date, of the six federal courts which have addressed the issue of state action immunity for home rule cities, the most thorough and thoughtful analysis has been provided by the district court in *Woolen v. Surtran Taxicabs, Inc.* In the *Surtran* court's view, regardless of the extent of a home rule municipality's "sovereignty" under state law, the Supreme Court majority's rationale and holding in *City of Lafayette* established that as a matter of federal policy the antitrust laws are paramount and cities therefore do not automatically have immunity. Ac-

cordingly, the *Surtran* court expressly rejected the contention that a constitutional home rule city is a sovereign equivalent to the state itself and so immune from the antitrust laws under *Parker*. 461 F. Supp. at 1032.

Any conclusion other than the foregoing leads to the absurd result that the existence or absence of antitrust immunity depends solely on whether a local governmental unit possesses home rule powers under state law, rather than on whether it meets the federal standards identified by this Court in *City of Lafayette*. In turn, this result leads to two further difficulties. First, different immunity results may be reached among cities in the same state depending on whether or not they possess home rule powers. *Compare Pueblo Aircraft Service, Inc. v. City of Pueblo*, 498 F. Supp. 1205 (D. Colo.), *appeal docketed*, No. 80-2083 (10th Cir. Oct. 16, 1980) (Colorado home rule municipality immune) *with Stauffer v. Town of Grand Lake*, 987 Antitrust & Trade Reg. Rep. (BNA) A-9 (D. Colo. Oct. 9, 1980) (non-home rule Colorado municipality not immune). Second, opposite results may be reached with respect to the same activity among different cities depending on whether or not they possess home rule powers. *Compare Pueblo Aircraft Service, Inc. v. City of Pueblo* (home rule city's ownership and operation of municipal airport immune), *with Guthrie v. Genesee County*, 494 F. Supp. 950 (W. D. N. Y. 1980) *and Pinehurst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F. Supp. 543 (M. D. N. C. 1979) (non-home rule cities not immune in connection with ownership and operation of municipal airports).

Notwithstanding the decision of the Tenth Circuit here, *City of Lafayette* makes clear that it is the challenged activity, not the status of the city involved, which

is the proper focus for state action immunity analysis. *See* 435 U. S. at 420 (Burger, C. J., concurring). The aforementioned patently inconsistent application of the state action immunity doctrine between home rule and non-home rule cities[8] indicates the need for this Court to reemphasize the proper focus in this area.

II. The Tenth Circuit has disregarded this Court's teaching in City of Lafayette with respect to state action immunity for municipalities.

A. The Tenth Circuit's decision directly conflicts with the plurality opinion of the Supreme Court in City of Lafayette.

In the case at hand, the Tenth Circuit ruled that the actions and policies of home rule cities are sufficient, in and of themselves and without the necessity for any corresponding state policy, to meet the requisites for state action immunity. 630 F. 2d at 708. Thus, it held in effect that home rule cities occupy a unique status equivalent to states for antitrust immunity purposes. In so concluding, the Tenth Circuit refused to follow the guidance provided by a plurality of this Court in *City of Lafayette*. This refusal was erroneous because the *Lafayette* plurality opinion has been cited as controlling precedent by both later Supreme Court state action immunity decisions,[9] as well as by virtually every subsequent lower federal court case

8 Although a split does not exist among the *circuits* at present, that is the best result which can be hoped for. If the Sixth Circuit does not reverse the *Glenwillow Landfill, Inc. v. City of Akron* home rule case which is now before it on appeal (see text at 5-6), the circuits will be uniform in adhering to an incorrect standard.

9 *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U. S. at 105; *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978).

finding state action immunity for a subordinate governmental entity.[10]

In *City of Lafayette*, a plurality of this Court ruled that antitrust immunity for a state's subdivisions, such as its cities, extends only to "anticompetitive conduct engaged in as an act of government by the *State*[*'s*] . . . *subdivisions*, pursuant to *state policy* to displace competition. . . ." *Id.* at 413 (emphasis added). The plurality opinion specifically rejected the argument (of particular import for home rule cities) that municipalities necessarily act in a way reflecting state policy, and therefore have immunity, in situations where they may exercise the state's sovereign power. *Id.* at 413-14. Finally, the *Lafayette* plurality concluded that "a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government. . . ."[11] *Id.* at 415. In

---

10 *Princeton Community Phone Book, Inc. v. Bate*, 582 F. 2d 706, 717, 719-20 (3d Cir.), *cert. denied*, 439 U. S. 966 (1978); *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 498 F. Supp. 1205, 1209 (D. Colo.), *appeal docketed*, No. 80-2083 (10th Cir. Oct. 16, 1980); *Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. 1176, 1190 (D. Md. 1980); *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. 671, 677 (N. D. Ohio 1979), *appeal docketed sub nom. Hybud Equip. Corp. v. City of Akron*, No. 80-3121 (6th Cir. Jan. 14, 1980); *Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Author.*, 475 F. Supp. 711, 721 (D. D. C. 1979), *aff'd mem.*, No. 79-1658 (D. C. Cir. Jul. 3, 1980), *petition for cert. filed*, 49 U. S. L. W. 3429 (U. S. Nov. 25, 1980); *Shrader v. Horton*, 471 F. Supp. at 1241-42; *City of Mishawaka v. American Elec. Power Co.*, 465 F. Supp. 1320, 1347 (N. D. Ind. 1979), *aff'd in part, rev'd in part*, 616 F. 2d 976 (7th Cir.), *cert. denied*, 49 U. S. L. W. 3481 (U. S. Jan. 12, 1981); *Cedar-Riverside Assocs. v. United States*, 459 F. Supp. 1290, 1298 (D. Minn. 1978), *aff'd on other grounds sub nom. Cedar-Riverside Assocs. v. City of Minneapolis*, 606 F. 2d 254 (8th Cir. 1979).

11 On the state action continuum cities fall between states, which more easily qualify for immunity, and private entities, which have a more difficult time doing so. *See Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. at 1189, 1190; *United States v. Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, 484 (N. D. Ga. 1979).

essence, then, the plurality opinion established a dichotomy between the actions of a *state's subdivisions* and the policy of the *state itself;* the former are explicitly insufficient to confer antitrust immunity on their own.

The rationale advanced in the plurality opinion was that state action immunity derives from the dual state-federal system of sovereignty, and municipalities are not in and of themselves sovereign. Further, cities have not been treated as the equivalents of, or given the same federal deference as, the states which created them. Rather, they are mere instrumentalities of the state. *Id.* at 412. Additionally, cities have substantially less than statewide jurisdiction and might therefore express their own preferences rather than those of the state if simply left free to make individual decisions. *Id.* at 414.

The *Lafayette* plurality's conclusions are applicable in the case of home rule cities because the existence and breadth of home rule powers enjoyed by municipalities within their own borders is a consideration irrelevant to the plurality's rationale. Thus, notwithstanding the ruling of the court below, even the actions of a home rule "subdivision" of a state do not confer antitrust immunity on that subdivision absent the existence of a *state* policy to displace competition.

B. The Tenth Circuit has attempted to distinguish City of Lafayette on the unfounded basis that its applicability is limited to so-called "proprietary" activity.

The Tenth Circuit viewed *City of Lafayette* as applicable only to situations involving "proprietary," and not "governmental," activity. 630 F. 2d at 708. Supposedly, activity which is "proprietary" in nature does not qualify for state action immunity but "governmental" activity

does. However, neither *City of Lafayette* itself nor subsequent case law supports the existence of such a distinction.[12]

Only one of the nine Supreme Court justices can even arguably be said to have employed such an analytical approach in *Lafayette.* Moreover, Chief Justice Burger did not explicitly posit such a distinction but merely noted that the activity there at issue was *in fact* proprietary in nature. *See generally* 435 U. S. at 418-26 (Burger, C. J., concurring). It is illuminating to note that in the two state action immunity cases decided by this Court after *City of Lafayette,* neither Chief Justice Burger nor any other member of the Court has made any mention of such a proprietary-governmental distinction. *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U. S. 97 (1980); *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U. S. 96 (1978).

Of course, it may be possible selectively to classify the activity involved in a particular case as being governmental or proprietary in nature. However, any such focus is meaningless for purposes of antitrust immunity analysis. Both of the post-*Lafayette* Supreme Court decisions noted above involved what could subjectively be categorized as purely "governmental" activity—the regulation by government agencies of the distribution of certain

---

12 Use of any proprietary-governmental focus in state action immunity analysis is subject to logical criticism on at least two grounds. First, it simply would make no sense for a city like Boulder to be subject to the antitrust laws if it operates a facility itself, but to be immune if it delegates authority to a separate entity to act in the city's stead and then regulates that entity. This is particularly true inasmuch as the anticompetitive effects may be the same in each instance. Second, any and all action by any government arguably may be viewed as being governmental in nature. *See City of Lafayette v. Louisiana Power & Light Co.,* 435 U. S. at 432-34 (Stewart, J., dissenting).

products (wine in *Midcal* and automobiles in *Fox*). Yet, immunity was found for the "governmental" activity in the one case (*Fox*) but not in the other (*Midcal*). Thus, whether the activity in question can be characterized as governmental makes absolutely no difference to the Supreme Court for purposes of state action immunity.

The bulk of the lower federal court state action immunity cases further support this analysis. As in *Midcal*, several cases involving powers which could be classified as "governmental," such as zoning[13] or regulation of the practice of accounting,[14] have resulted in a finding of no antitrust immunity. On the other hand, several cases involving the provision of "commercial" type services similar to those involved in *City of Lafayette* have nonetheless resulted in immunity.[15]

Notwithstanding the foregoing, a handful of lower court post-*Lafayette* state action immunity cases in addition to the instant one have utilized a proprietary-governmental focus in their analysis.[16] The vast majority of

---

13 *Stauffer v. Town of Grand Lake*, 987 Antitrust & Trade Reg. Rep. (BNA) A-9 (D. Colo. Oct. 9, 1980); *Whitworth v. Perkins*, 559 F. 2d 378 (5th Cir. 1977), *vacated and remanded sub nom. City of Impact v. Whitworth*, 435 U. S. 992, *reinstated on remand*, 576 F. 2d 696 (1978), *cert. denied*, 440 U. S. 911 (1979); *Mason City Center Assocs. v. City of Mason City*, 468 F. Supp. 737 (N. D. Iowa 1979).

14 *United States v. Texas State Bd. of Pub. Accountancy*, 464 F. Supp. 400 (W. D. Tex. 1978), *aff'd per curiam*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979).

15 *E. g., Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. at 1179-81 (operation of water system); *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. at 673-74 (operation of solid waste disposal facility); *City of Mishawaka v. American Elec. Power Co.*, 465 F. Supp. at 1346-47 (operation of electric, water and sewer services).

16 *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 498 F. Supp. at 1210; *In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. at 1087-88; *Shrader v. Horton*, 471 F. Supp. at 1242; *Cedar-Riverside Assocs. v. United States*, 459 F. Supp. at 1298-99.

post-*Lafayette* decisions, however, have either expressly rejected[17] or simply not utilized such a distinction.[18]

Contrary to the ruling of the Tenth Circuit, then, whether an activity may subjectively be classified as proprietary or governmental in nature is not determinative of the existence or absence of state action immunity. Nevertheless, on this point there is a split of authority among the lower federal courts which should be rectified by this Court before the case law becomes further confused.

III. The Tenth Circuit has established an erroneous precedent by misapplying the state action immunity tests established by this Court for all subordinate governmental entities.

Read together, prior Supreme Court decisions mandate the undertaking of a thorough two-pronged inquiry in all cases involving the question of state action immunity for subordinate governmental entities. This analytical approach is required whether home rule powers are involved or not and whether the activity in question may arbitrarily be categorized as "proprietary" or "governmental" in nature. In short, rather than reaching any automatic conclusion based simplistically on the status of the municipality and a categorization of the activity involved, a careful determination must be made whether there exists: (i) a clearly articulated and affirmatively expressed *state* policy to displace competition with regulation or monopoly public service, and active *state* supervision of that policy, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U. S. at 105[19];

---

17 *Pinehurst Airlines, Inc. v. Resort Air Servs., Inc.*, 476 F. Supp. 543, 552 (M. D. N. C. 1979).

18 *See, e. g.*, cases cited at nn. 13, 14 and 15 *supra*.

19 *Accord, Bates v. State Bar of Arizona*, 433 U. S. 350, 360 (1977). *See also Cantor v. Detroit Edison Co.*, 428 U. S. at 585; *Goldfarb v. Virginia State Bar*, 421 U. S. at 791; *Parker v. Brown*, 317 U. S. at 352.

and (ii) "contemplation" by the state that the local governmental entity will engage in the *kind* of anticompetitive activity complained of, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 415.[20] *See generally Stauffer v. Town of Grand Lake*, 987 Antitrust & Trade Reg. Rep. (BNA) A-9 (D. Colo. Oct. 9, 1980).

A. The State of Colorado has no specific policy with respect to cable television and does not exercise supervisory power over that subject matter area.

In Colorado, there exists no express state policy relative to cable television. Neither the Colorado Constitution nor any state statute addresses the subject and no agency or mechanism has been established by Colorado for active supervision of cable television. Even the Colorado Public Utilities Commission has declined to exercise jurisdiction over the subject. *See In re Mountain States Telephone & Telegraph Co.*, 73 P.U.R. 3d 161, 172-73 (Colo. Pub. Util. Comm'n 1968).

In light of the foregoing, it cannot be said that Colorado has a comprehensive policy—which is clearly articulated, affirmatively expressed and actively supervised by the state—to displace competition in cable TV with regulation or monopoly public service as required by *Midcal. Community Communications Co. v. City of Boulder*, 630

---

20 *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F. 2d 530, 549-51 (5th Cir. 1978), *cert. denied*, 100 S. Ct. 262 (1979); *Highfield Water Co. v. Public Serv. Comm'n.*, 488 F. Supp. at 1190; *Guthrie v. Genesee County*, 494 F. Supp. at 956; *Pinehurst Airlines, Inc. v. Resort Air Servs., Inc.*, 476 F. Supp. at 552; *In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. at 1096; *Mason City Center Assocs. v. City of Mason City*, 468 F. Supp. at 743; *United States v. Texas State Bd. of Pub. Accountancy*, 464 F. Supp. at 404; *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Author.*, 451 F. Supp. 157, 165-67 (S. D. N. Y. 1978).

F. 2d at 717 (Markey, C. J., dissenting). In fact, the only policy or action expressly involved in the case at hand is that of the city of Boulder itself: "[W]e are here concerned with City action in the absence of any regulation whatever by the State of Colorado. . . . We have only the action or exercise of authority by the City. . . . [T]he regulation here concerned was . . . the only expression of policy as to the subject matter." *Id.* at 707.

The most that can be said in the instant case is that there is no *state* policy which expressly relates to the subject of cable television. In this situation, Colorado presumably would intend that its home rule cities exercise their powers in a manner consistent with the antitrust laws and the strong national policy in favor of competition. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 414-15; *Mason City Center Associates v. City of Mason City*, 468 F. Supp. at 743. In fact, that is exactly the case here: Colorado does have one state policy which is applicable to cable TV, and it is the pro-competitive one set forth in the state's antitrust law. *See* Colo. Rev. Stat. 1973, §§ 6-4-101 *et seq.* *City of Lafayette* makes clear that pro-competitive antitrust policies take precedence over the parochial interests of individual cities. 435 U. S. at 408. Nevertheless, the court below conversely ruled that the actions and interests of the city of Boulder alone were sufficient to override the policies expressed in the antitrust laws and meet the requisites of *Midcal*.[21] 630 F. 2d at 708.

---

21 The basis for the Tenth Circuit's holding in this regard was its determination that cable TV is a matter of *purely* local concern over which a home rule city has the full right of self-government. *Id.* at 706-07. Aside from the broader federal

(Continued on next page)

In the thirty-eight years since the state action immunity doctrine was first announced in *Parker*, this Court has never found an antitrust exemption without action or an expression of policy by the *state itself*. Moreover, aside from the recent aberrant decisions of the two federal courts in Colorado, no post-*Lafayette* lower federal court case has found such immunity without the existence of both a state policy and a state supervisory agency. Even in the *Glenwillow Landfill, Inc. v. City of Akron* municipal home rule case both conditions were met. *See* 485 F. Supp. at 675-77. Consequently, antitrust immunity cannot exist in a situation such as the one here, where there has been no action whatever by the state relative to the subject-matter area in question and the only state policy is one favoring competition.

B. The Colorado Constitution's grant of general home rule governing power to Colorado municipalities does not evidence contemplation by the State of Colorado that such power may be used in an anticompetitive fashion.

As a home rule city under Colo. Const. art. XX, sec. 6, Boulder has all of the powers conferred by art. XX, sec. 1, thereof on the City of Denver. Colo. Const. art.

(Continued from previous page)

policy considerations previously noted, the Tenth Circuit's reasoning fails because cable TV is inherently more than just local in character. *See United States v. Southwestern Cable Co.*, 392 U. S. 157, 168-69 (1968) (cable TV involves interstate commerce); *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459, 461, 463 (D. Nev. 1968), *aff'd per curiam*, 396 U. S. 556 (1970) (cable TV is in, and an integral part of, interstate commerce); *Nugent v. City of East Providence*, 238 A. 2d 758, 762 (R. I. 1968) (cable TV is *not* so restricted to the confines of a particular city as to be *purely* local in nature for municipal home rule purposes). Any other conclusion would result in utter chaos. If cable TV is purely local, virtually any subject matter may be viewed the same way and can therefore qualify for antitrust immunity under the Tenth Circuit's approach. Accordingly, as a matter of both precedent and policy, cable TV cannot be accorded such status.

XX, sec. 6 (attached hereto as Appendix E). Consequently, Boulder is specifically empowered, *inter alia*, to regulate "works or ways local in use and extent." *Id.* sec. 1 (attached hereto as Appendix F). Because Colorado municipalities have no express authority with respect to cable TV, Boulder has always relied on this enumerated power over the public rights of way as the basis for its regulation of cable television. *See* Boulder, Colorado, City Ordinances No. 2846 (Oct. 6, 1964) at ¶¶ 1-6, No. 4472 (Jan. 1, 1980) at ¶¶ 2-8, No. 4473 (Dec. 18, 1979) at ¶ 1, and No. 4515 (Jul. 22, 1980) at ¶ 2 (attached hereto as appendices G, H, I and J, respectively).

However, the *Airport Car Rental* court expressly held that the Colorado Constitution's grant of home rule power to operate in a particular subject-matter area under art. XX, sec. 1, does not confer state action immunity on a recipient municipality. 474 F. Supp. at 1096. Accordingly, the Tenth Circuit ignored art. XX, sec. 1, and in effect found Boulder to have antitrust immunity stemming from the even more vague general governing authority contained in art. XX, sec. 6.[22] 630 F. 2d at 706-07. That

22 An additional underpinning of the Tenth Circuit's opinion on Boulder's immunity was the decision in *Manor Vail Condominium Ass'n v. Town of Manor Vail*, — Colo. —, 604 P. 2d 1168 (1980). The court below viewed that case as acknowledging, *sub silentio*, that the anticompetitive activity of setting rates for cable TV constitutes a valid exercise of municipal home rule power. 630 F. 2d at 706. However, *Manor Vail* was a 14th amendment equal protection case, and the Colorado court there considered no antitrust issues whatever. *See* 630 F. 2d at 718 (Markey, C. J., dissenting). Thus, it cannot be inferred from *Manor Vail* that Colorado home rule cities are empowered to engage in any anticompetitive activity relative to cable television. Moreover, *Manor Vail* did not involve the same type of activity as that at issue here. *Id.* n. 19. Consequently, even if interpretation of that case could be stretched to imply contemplation that home rule cities may set cable TV rates, it provides

(Continued on the next page)

provision has nothing to do with cable TV or even anti-competitive conduct; it merely confers on Boulder the right of self-government over local and municipal matters within its own borders.[23]

For three reasons, all rooted in *City of Lafayette*, the grant of general home rule governing power in art. XX, sec. 6, does not confer antitrust immunity on Colorado municipalities. For one thing, it does not constitute "authority . . . to operate in *a particular area*," and so cannot evidence contemplation of "the *kind* of action complained of." 435 U. S. at 415 (emphasis added, footnote and citation omitted). Additionally, there can be no "contemplation" of any anticompetitive activity within the meaning of *Lafayette* where, as here, there is no requirement or suggestion regarding the *manner* in which such general governing power is to be used. *See In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. at 1096. Finally, viewing that amorphous provision as authorizing anticompetitive conduct by home rule cities would afford virtual blanket antitrust immunity to such municipalities *whenever* they exercise home rule powers, a result prohibited by *Lafayette*. *See Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. at 1031-32.

(Continued from the previous page)

no authority whatever for such municipalities to engage in a *different kind* of activity such as imposing a moratorium on cable TV service. *See Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. at 1031-32 (conferral of anticompetitive power to set rates and prohibit use of streets without governmental consent held not to contemplate anticompetitive use of such power to establish monopoly). Thus, in fact, *Manor Vail* provides no support for the Tenth Circuit's decision.

23 A similar rationale was advanced by the courts in *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 498 F. Supp. at 1209-10, and *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. at 677-78.

—o—

CONCLUSION

In light of the impending cable TV explosion,[24] the importance of this case for that industry alone is enormous. The insulation of thousands of home rule municipalities nationwide from the antitrust laws carries with it unparalleled potential for anticompetitive conduct in the awarding and regulation of cable TV permits. This potential for economic harm is expanded geometrically when municipal activities in other spheres (*e. g.*, airports, utilities, zoning, etc.) are taken into consideration as well. "To permit municipalities to be shielded from the antitrust laws in such circumstances would impair the goals Congress sought to achieve by those laws . . . without furthering the policy underlying the *Parker* 'exemption.'" *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 415. Consequently, if allowed to stand, the Tenth Circuit's opinion would constitute a precedent severely disruptive of "the fundamental national economic policy" of competition. *Gulf States Utilities Co. v. FPC*, 411 U. S. 747, 759 (1973). For the foregoing reasons, this Court should grant *certiorari* in the instant case and reverse the Tenth

---

24 In just the next four years, the number of pay cable TV subscribers is expected to double or triple from the current 8.3 million households. It is anticipated that billions of dollars will be spent on pay cable each year. *See United States v. Columbia Pictures Indus.*, 996 Antitrust & Trade Reg. Rep. (BNA) A-7 (S. D. N. Y. Dec. 31, 1980), No. 80 Civ. 4438 (*GLG*) slip op. at 5 (attached hereto as appendix K).

Circuit's decision granting automatic antitrust immunity to home rule municipalities.

Respectfully submitted,

J. D. MacFARLANE
Attorney General

/s/ MARY J. MULLARKEY
Solicitor General

A member of the Bar
of this Court

/s/ THOMAS P. McMAHON
Assistant Attorney General
Antitrust Section
Counsel of Record

Not a member of the Bar
of this Court

Attorneys for *Amicus Curiae*

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 839-3611

APPENDIX A

COLORADO REVISED STATUTES 1973

TITLE 6

CONSUMER AND COMMERCIAL AFFAIRS

ARTICLE 4

Restraint of Trade and Commerce

6-4-101. *Illegal restraint of trade.* Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is declared illegal. Every combination, conspiracy, trust, pool, agreement, or contract intended to restrain or prevent competition in the supply or price of any article or commodity constituting a subject of trade or commerce in this state, or every combination, conspiracy, trust, pool, agreement, or contract which controls in any manner the price of any such article or commodity, fixes the price thereof, or limits or fixes the amount or quantity thereof to be manufactured, produced, or sold in this state, or monopolizes or attempts to monopolize any part of the trade or commerce in this state, is declared an illegal restraint of trade. (1979 Cum. Supp.)

6-4-102. *Unlawful conspiracy.* Every person, corporation, copartnership, trustee, or association who, either as principal or agent, makes any contract or engages in any combination, conspiracy, trust, pool, or agreement declared unlawful or an illegal restraint of trade under this article, or who combines or conspires with any other person, corporation, copartnership, association, or trustee to monopolize any part of the trade or commerce in this state is guilty of an unlawful conspiracy and, upon conviction thereof, shall be punished as provided in section 6-4-107.

6-4-103. *Exemptions.* (1) Nothing in this article shall be construed to forbid the existence and operation of labor,

agricultural, or horticultural organizations instituted for the purpose of mutual help, or engaged in making collective sales or marketing for its members or shareholders of farm, orchard, or dairy products produced by its members or shareholders, and not having capital stock or conducted for profit or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under this article.

(2) The labor of a human being is not a commodity or article of commerce.

6-4-104. *Prosecution of criminal proceedings by attorney general—limitation.* The attorney general shall prosecute all criminal proceedings for violation of any of the provisions of this article. All criminal proceedings brought under this article shall be commenced within six years after the act complained of occurred, and not afterwards. (1979 Cum. Supp.)

6-4-105. *Attorney general to institute action to restrain formation of contract or combination.* The district courts may prevent or restrain, by injunction or otherwise, the formation of any such contract or combination or the execution of the purposes thereof. The attorney general shall have exclusive authority to institute such actions or proceedings as he deems necessary to prevent or restrain a violation of the provisions of this article, which shall begin by way of a complaint, setting forth the cause and grounds for the intervention of the court and praying that such violation, whether intended or continuing, shall

be enjoined or otherwise prohibited. When the parties complained against have been served with a copy of the complaint and cited to answer the same, the court shall proceed, as soon as permitted by its rules, to the hearing and determination of the case. Pending the filing of the answer to such complaint, the court may upon proper notice make such temporary restraining order or prohibition as shall be just. When it appears to the court that the ends of justice require that other persons should be made parties to the action or proceeding, the court may cause them to be brought before it in such manner as it directs. (1979 Cum. Supp.)

6-4-106. *Void contracts—refund—limitation of actions.* All contracts or agreements made by any person, firm, corporation, or association while a member of any combination, conspiracy, trust, or pool prohibited under this article which are founded upon, or are the result of, or grow out of, or are connected with any violation of this article, either directly or indirectly, shall be void, and no recovery thereon or benefit therefrom shall be had by or for any such person, firm, corporation, or association. Any payments made upon, under, or pursuant to such contract or agreement to or for the benefit of such person, firm, corporation, or association may be recovered in an action by the party making the payment, his heirs, personal representatives, or assigns, but suit for recovery shall be brought within six years after the making of said contract or agreement.

6-4-107. *Violations—penalty.* (1) Any officer, director, employee, or agent of any corporation, company, firm, or association; or any member of any company, firm, or association; or any individual who violates any provision

of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

(2) Any corporation, company, firm, or association found guilty of a violation of any provision of this article shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars for the first offense and not less than one thousand dollars nor more than ten thousand dollars for the second and any subsequent offense.

6-4-108. *Damages.* Any person, corporation, copartnership, trustee, or association shall also be liable to any person transacting or doing business in this state for any damages he may sustain by reason of the doing of anything declared unlawful in this article.

6-4-109. *Construction of article.*
Repealed, L. 75, p. 261, § 1. (1979 Cum. Supp.)

APPENDIX B

List of Home Rule Municipalities in Colorado*

(as of July 1, 1980)

Alamosa
Arvada
Aspen
Aurora
Avon
Boulder
Breckenridge
Broomfield
Burlington
Canon City
Cherry Hills Village
Colorado Springs
Commerce City
Cortez
Craig
Crested Butte
Delta
Denver
Durango
Edgewater
Englewood
Evans
Fort Collins
Fort Morgan
Fountain
Glendale
Glenwood Springs
Golden
Grand Junction
Greeley
Greenwood Village
Gunnison
Lafayette
La Junta
Lamar
Littleton
Longmont
Manitou Springs
Monte Vista
Montrose
Mountain View
Mt. Crested Butte
Northglenn
Ophir
Pueblo
Rifle
Steamboat Springs
Sterling
Telluride
Thornton
Vail
Ward
Westminster
Wheat Ridge
Woodland Park
Wray

*Taken from Colorado Municipal League, Municipal and County Officials in Colorado 1980 Directory at 42 (1980).

APPENDIX C

List of Home Rule Municipalities in Oklahoma*

Ada
Anadarko
Ardmore
Atoka
Bartlesville
Bethany
Blackwell
Bristow
Chandler
Cherokee
Chickasha
Choctaw
Cleveland
Clinton
Coalgate
Collinsville
Comanche
Cordell
Cushing
Davis
Del City
Dewey
Drumwright
Duncan
Edmond
El Reno
Elk City
Enid
Guthrie
Healdton
Heavener
Kingfisher
Midwest City
Moore
Mustang
Muskogee
Newkirk
Nichols Hills
Nicoma Park
Norman
Nowata
Oklahoma City
Okmulgee
Owasso
Pauls Valley
Pawhuska
Ponca City
Pryor
Purcell
Sallisaw
Sand Springs
Sapulpa
Seminole
Shawnee
Stigler
Stillwater
Sulphur
Tahlequah
Tecumseh
The Village
Tishomingo
Tulsa
Wagoner
Walters

*Compiled from Oklahoma Municipal League, Forms of Government in Cities Having Charters (1980).

Konawa
Lawton
Lindsay
McAlester
Madill
Mangum
Marlow
Miami
Warr Acres
Waurika
Weatherford
Wewoka
Woodward
Wynnewood
Yukon

APPENDIX D

List of Home Rule Municipalities in Wyoming*

Afton
Albin
Baggs
Bairoil
Basin
Big Piney
Buffalo
Burns
Byron
Casper
Cheyenne
Chugwater
Clearmont
Cody
Cokeville
Cowley
Dayton
Deaver
Diamondville
Dixon
Douglas
Dubois
East Thermopolis
Edgerton
Elk Mountain
Encampment
Evanston
Evansville
Ft. Laramie
Frannie
Gillette
Glendo
Glenrock
Labarge
La Grange
Lander
Laramie
Lingle
Lost Springs
Lovell
Lusk
Lyman
Manderson
Manville
Marbleton
Medicine Bow
Meeteetse
Midwest
Mills
Moorcroft
Mountain View
Newcastle
Pavillion
Pine Bluffs
Pinedale
Powell
Ranchester
Rawlins
Riverside
Riverton
Rock River
Rock Springs
Saratoga
Sheridan
Shoshoni
Sinclair

*Compiled from Wyoming Association of Municipalities, Official Municipal Roster and Supplement (1980).

Granger
Green River
Greybull
Guernsey
Hanna
Hartville
Hudson
Hulett
Jackson
Kaycee
Kemmerer
Kirby
South Superior
Sundance
Ten Sleep
Thayne
Thermopolis
Torrington
Upton
Van Tassell
Wamsutter
Wheatland
Worland
Yoder

APPENDIX E

COLORADO CONSTITUTION
ARTICLE XX

Home Rule Cities and Towns

Section 6. *Home rule for cities and towns.* The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

Proposals for charter conventions shall be submitted by the city council or board of trustees, or other body in which the legislative powers of the city or town shall then be vested, at special elections, or at general, state or municipal elections, upon petition filed by qualified electors, all in reasonable conformity with section 5 of this article, and all proceedings thereon or thereafter shall be in reasonable conformity with sections 4 and 5 of this article.

From and after the certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and

all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

a. The creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees;

b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;

c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof;

d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;

e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;

g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the secretary of state, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the secretary of state, which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date.

Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force.

The provisions of this section 6 shall apply to the city and county of Denver.

This article shall be in all respects self-executing.

As amended November 5, 1912. (See Laws 1913, p. 669.)

APPENDIX F

COLORADO CONSTITUTION

ARTICLE XX

Home Rule Cities and Towns

Section 1. *Incorporated.* The municipal corporation known as the city of Denver, and all municipal corporations and that part of the quasi-municipal corporation known as the county of Arapahoe, in the state of Colorado, included within the exterior boundaries of the said city of Denver as the same shall be bounded when this amendment takes effect, are hereby consolidated and are hereby declared to be a single body politic and corporate, by the name of the "City and County of Denver". By that name said corporation shall have perpetual succession, and shall own, possess, and hold all property, real and personal, theretofore owned, possessed, or held by the said city of Denver and by such included municipal corporations, and also all property, real and personal, theretofore owned, possessed, or held by the said county of Arapahoe, and shall assume, manage, and dispose of all trusts in any way connected therewith; shall succeed to all the rights and liabilities, and shall acquire all benefits and shall assume and pay all bonds, obligations, and indebtedness of said city of Denver and of said included municipal corporations and of the county of Arapahoe; by that name may sue and defend, plead and be impleaded, in all courts and places, and in all matters and proceedings; may have and use a common seal and alter the same at pleasure; may purchase, receive, hold, and enjoy or sell and dispose of, real and personal property;

may receive bequests, gifts, and donations of all kinds of property, in fee simple, or in trust for public, charitable, or other purposes; and do all things and acts necessary to carry out the purposes of such gifts, bequests, and donations, with power to manage, sell, lease, or otherwise dispose of the same in accordance with the terms of the gift, bequest, or trust; shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefore, for the use of said city and county and the inhabitants thereof, and any such systems, plants, or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided.

The provisions of section 3 of article XIV of this constitution and the general annexation and consolidation statutes of the state relating to counties shall apply to the city and county of Denver. Any contiguous town, city, or territory hereafter annexed to or consolidated with the city and county of Denver, under any of such laws of this state, in whatsoever county the same may be at the time, shall be

detached per se from such other county and become a municipal and territorial part of the city and county of Denver, together with all property thereunto belonging.

The city and county of Denver shall alone always constitute one judicial district of the state.

As amended by the People, November 5, 1974—Effective upon proclamation of the Governor, December 20, 1974.

Any other provisions of this constitution to the contrary notwithstanding:

* * *

[City of Denver annexation/consolidation limitation omitted.]

Adopted November 5, 1974—Effective upon proclamation of the Governor, December 20, 1974. (See Laws 1974, p. 457.) (1979 Cum. Supp.)

APPENDIX C

ORDINANCE NO. 2846

AN ORDINANCE GRANTING A REVOCABLE PERMIT OF THE CITY OF BOULDER, TO COLORADO TELEVENTS, INC., A COLORADO CORPORATION, TO CONDUCT THE BUSINESS OF A COMMUNITY ANTENNA TELEVISION SYSTEM IN THE CITY OF BOULDER, FOR A PERIOD OF TWENTY YEARS; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, Colorado Televents, Inc., a Colorado corporation, with offices at 270 Columbine Street, Denver, Colorado, has made application to the City Council of the City of Boulder for a permit to conduct the business of a community antenna television system in said City of Boulder through the media of transmission by cables, and/or wires, or otherwise, commonly known as a Master Antenna Cable System, and;

WHEREAS, said cable system would be attached to poles whereby said cables, wires, and related appurtenances would cross over the streets, alleys, sidewalks, highways and other public ways and places of the said City of Boulder, and;

WHEREAS, the City Council is of the opinion that the operation of a community antenna television system is necessary so that those persons who are situated in the City so as not to get adequate television reception may receive the same; and,

WHEREAS, the City Council is of the opinion that the best and most practical method of providing said services is by granting to a private person or company, revocable

authority and permission to operate such approved system upon terms and conditions prescribed and acceptable to the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That there is hereby granted unto Colorado Televents, Inc., its successors and assigns, hereinafter referred to as the grantee, the right, permit and privilege, for a period of twenty (20) years from date of final adoption of this ordinance, to conduct the business of a Community Antenna Television System in said City of Boulder; and to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder; save and except that the aforesaid rights and privileges shall be subject to the conditions, exceptions and limitations herein contained.

Section 2. That the right, permit and privilege herein granted is subject to revocation by the City Council, at its pleasure, at any time. In the event of revocation, termination or expiration of this permit the grantee shall at its own expense remove any poles, wires, cables and related appurtenances that shall have been erected and shall leave the streets, alleys, and public ways and places in as good condition as they were prior to said installation. To this end the grantee shall post a performance bond, as provided in Section 10 hereof.

Section 3. The right to use and occupy said streets, alleys and other public ways for the purposes herein set forth shall not be exclusive, and the City reserves the right to grant a similar use in said streets and alleys to any other person or persons. Wherever possible, the company shall use existing facilities of public utility companies, provided said grantee, or its assigns, first secures the permission and consent of the aforesaid public utility companies concerned, to affix said cables or wires, or other apparatus to their pole facilities.

Section 4. Poles or towers shall be so erected so as not to interfere with the traffic over the streets and alleys, and the location of all poles, towers or other structures on public property shall be placed with prior written approval and under the supervision of the City of Boulder as to such location, giving consideration to the reasonable operation of the same; providing further, that such location on public property shall not be a vested interest, and the same shall be removed by the grantee whenever, in the sole determination of the City, the same restrict or obstruct the operation or location of said streets, alleys, or public places, or municipal or franchised utilities located therein.

Section 5. Any and all streets and sidewalks disturbed or damaged in the construction or maintenance of said cables, lines and other appurtenances shall be promptly repaired by the grantee, at its expense, and to the satisfaction of the City of Boulder.

Section 6. The grantee shall be subject to all ordinances now in force, or that may hereafter be enacted, relative to the use of the streets, alleys, sidewalks and public ways and places of the City of Boulder.

Section 7. The covenants, conditions and limitations of this permit shall be binding upon the successors and assigns of the grantee, and the right granted hereunder shall not be assigned or subleased by the grantee without the prior written approval of the City of Boulder.

Section 8. The City reserves the right to adopt, from time to time, in addition to the provisions herein contained, such ordinances as may be deemed necessary to the exercise of the Police power; provided, that such regulations shall be reasonable and not destructive to the rights herein granted and not in conflict with the laws of the United States, the State of Colorado, or other local laws or regulations.

Section 9. The company hereby expressly agrees that it will save, keep harmless and defend the City of Boulder from any and all damages and liabilities it may have or sustain by reason of the construction, operation or maintenance of the system. This will be guaranteed to the City by a Public Liability and Property Damage Policy to the City in the amount of $100,000./$300,000. Public Liability, and $25,000./$50,000. Property Damage. Said policy to be negotiated and paid for by the grantee and kept in effect throughout the term of this permit.

Section 10. Within thirty (30) days after the final reading of this ordinance by the City Council, the grantee shall signify its acceptance of the terms herein by filing in the office of the Director of Finance of the City of Boulder, a bond in the sum of Five Thousand dollars (5,000.00), to be executed by the grantee, with good and sufficient surety, running to and in favor of the City of Boulder, and conditioned upon the full and faithful

performance of all the terms and conditions of the license or permit by said grantee, its successors and assigns, and upon the further condition that the City shall be saved harmless from any damage arising out of the exercise by said grantee, its successors and assigns, of the rights hereby conferred; and upon the expiration of 30 days after final reading and upon filing of said bond this license or permit shall be in full force and effect for the full term hereof. The requirement for bond running to the City of Boulder may be met by the grantee furnishing to the City a certificate, satisfactory to the Director of Finance and Record, showing that bond in like amount and for the same purposes and conditions as set forth herein has been furnished to a public utility company franchised by the City of Boulder.

Section 11. The grantee shall commence operations as a community antenna television system in the City of Boulder within three (3) years from the effective date of this ordinance, or shall otherwise forfeit all rights and privileges granted hereunder, but otherwise this permit to remain in full force and effect.

Section 12. As a further consideration of this permit or license, and in lieu of all occupation and license taxes or other taxes on the right to do business, the grantee agrees to pay on the 1st day of January annually to the City of Boulder a sum equal to two per cent (2%) of its gross revenue derived from the conduct of its business within the corporate limits of the City or $100, whichever is the greater. The City shall have access to the grantees books and records to verify the amount due the City as reported by the grantee.

This ordinance shall take effect upon the expiration of thirty (30) days from adoption and publication in accordance with the Charter of the City of Boulder.

INTRODUCED, READ AND ORDERED PUBLISHED this 15th day of September, A.D. 1964.

/s/ H. Paul Crouch
Mayor

Attest:

/s/ M. E. Gause
Director of Finance and Record
Ex-officio City Clerk

READ ON SECOND READING, PASSED AND ADOPTED this 6th day of October, A.D. 1964.

/s/ H. Paul Crouch
Mayor

Attest:

/s/ M. E. Gause
Director of Finance and Record
Ex-officio City Clerk

APPENDIX H

ORDINANCE NO. 4472

AN ORDINANCE REPEALING ORDINANCE NO. 2846, REVOKING THE PERMIT TO CONDUCT THE BUSINESS OF A COMMUNITY ANTENNA TELEVISION SYSTEM GRANTED THEREUNDER; REENACTING SAID ORDINANCE WITH TEMPORARY GEOGRAPHICAL LIMITATIONS UPON THE GRANTEE; GRANTING A REVOCABLE PERMIT TO COMMUNITY COMMUNICATIONS COMPANY, INC., UNDER SAID ORDINANCE; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, the City Council of the City of Boulder granted a revocable permit to Colorado Televents, Inc., in 1964 to conduct the business of a Community Antenna Television System in the City of Boulder; and

WHEREAS, said permit was transferred and assigned to its current holder, Community Communications Company, Inc., a wholly owned subsidiary of Community Tele-Communications, Inc., in 1966; and

WHEREAS, cable television companies have within recent months displayed interest in serving the community and have requested the City Council to grant permission to use the public right-of-way in providing that service; and

WHEREAS, the present permittee, Community Communications Company, Inc., has indicated that it intends to extend its services in the near future to an additional 35 miles of the City of Boulder right-of-way; and

WHEREAS, the City Council finds that such an extension of service by the current permittee would result

in hindering the ability of other companies to compete in the Boulder market; and

WHEREAS, the City Council intends to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits in a reasonably short time, not to extend past March 18, 1980, and finds that an extension of service by the current permittee would result in a disruption of this application and evaluation process; and

WHEREAS, the City Council finds that placing temporary geographical limitations upon the operations of the current permittee would not impair the present services offered by Community Communications Company, Inc., to City of Boulder residents, and would not impair the ability of the current permittee to improve those services within the area presently served by it; and

WHEREAS, the City Council finds that it is in the public interest to repeal Ordinance No. 2846, to revoke the permit now held by Community Communications Company, Inc., to re-enact said ordinance with temporary geographical limitations, and to grant a revocable permit to Community Communications Company, Inc., under said ordinance as re-enacted.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That Ordinance No. 2846 is hereby repealed, and the revocable permit granted thereunder to Colorado Televents, Inc. and its assignee, Community

Communications, Inc., to conduct the business of a Community Antenna Television System in the City of Boulder is hereby revoked.

Section 2. That Ordinance No. 2846 is hereby reenacted to read as follows:

There is hereby granted unto Community Communications Company, Inc., a Colorado corporation and wholly owned subsidiary of Community Tele-Communications, Inc., a Colorado corporation, its successors and assigns, hereinafter referred to as the grantee, the right, permit and privilege, until November 6, 1984, to conduct the business of a Community Antenna Television System in said City of Boulder; and to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder; save and except that the aforesaid rights and privileges shall be subject to the conditions, exceptions and limitations herein contained.

Section 3. The City Council intends within a time not to extend past March 18, 1980, to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits. During the pendency of this application and evaluation process, not to extend past March 18, 1980, the grantee's right, permit and privilege to erect, construct, operate and maintain on, under and above the

present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder shall be exercised only within the geographical boundaries set forth in Exhibit A, attached to this ordinance and incorporated by reference herein.

It is the intent of this Section 3 that the grantee shall not expand its present system through working in the public right-of-way beyond the geographical areas presently served by the grantee during the effective period of this Section. In addition to any and all other remedies available to the City, a violation of this Section shall be grounds for immediate revocation of the permit granted herein and forfeiture of the performance bond referred to herein.

This Section shall expire and be of no effect upon the completion of the application and evaluation process described herein, and in any case no later than March 18, 1980.

Section 4. The right, permit and privilege herein granted is subject to revocation by the City Council, at its pleasure, at any time. In the event of revocation, termination or expiration of this permit, the grantee shall, at its own expense, remove any poles, lines, cables, wiring, and related appurtenances that shall have been erected and shall leave the streets, alleys, highways and public ways and places in as good condition as they were prior to said installation. To this end the grantee shall post a performance bond, as provided in Section 10 hereof.

Section 5. The right to use and occupy said streets, alleys, highways and other public ways and places for the purposes herein set forth shall not be exclusive, and the City reserves the right to grant a similar use to any other person or persons. Wherever possible, the company shall use existing facilities of public utility companies, provided said grantee, or its assigns, first secures the permission and consent of the aforesaid public utility companies concerned, to affix said lines, cables, wiring or related appurtenances to their pole facilities.

Section 6. Poles or towers shall be so erected so as not to interfere with the traffic over the streets, alleys, highways and other public ways and places, and all poles, towers or other structures placed on public property shall be placed with the prior written approval and under the supervision of the City of Boulder as to such location, giving consideration to the reasonable operation of the same; providing further, that such location on public property shall not be a vested interest, and the same shall be removed by the grantee whenever, in the sole determination of the City, the same restrict or obstruct the operation or location of said streets, alleys, highways, or other public ways or places, or municipal or franchised utilities located therein.

Section 7. Any and all streets and sidewalks disturbed or damaged in the construction or maintenance of said lines, cables, wiring or related appurtenances shall be promptly repaired by the grantee, at its expense, and to the satisfaction of the City of Boulder.

Section 8. The grantee shall be subject to all ordinances now in force, or that may hereafter be enacted,

relative to the use of the streets, alleys, highways and other public ways and places of the City of Boulder.

Section 9. The covenants, conditions and limitations of this permit shall be binding upon the successors and assigns of the grantee, and the right granted hereunder shall not be assigned or subleased by the grantee without the prior written approval of the City of Boulder.

Section 10. The City reserves the right to adopt, from time to time, in addition to the provisions herein contained, such ordinances as may be deemed necessary to the exercise of the Police power; provided, that such regulations shall be reasonable and not destructive to the rights herein granted and not in conflict with the laws of the United States, the State of Colorado, or other local laws or regulations.

Section 11. The grantee hereby expressly agrees that it will save, keep harmless and defend the City of Boulder from any and all damages and liabilities it may have or sustain by reason of the construction, operation or maintenance of the activities permitted hereby. This will be guaranteed to the City by a Public Liability and Property Damage Policy to the City in the amount of $100,000/$300,000 for public liability, and $25,000/$50,000 for property damage. Said policy shall be negotiated and paid for by the grantee and kept in effect throughout the term of this permit.

Section 12. The grantee shall signify its acceptance of the terms hereof by continuing to provide service to any customers presently served by the grantee. The grantee shall file in the office of the Director of Finance of the City of Boulder, a bond in the sum of Five Thousand

dollars ($5,000.00), to be executed by the grantee, with good and sufficient surety, running to and in favor of the City of Boulder, and conditioned upon the full and faithful performance of all the terms and conditions hereof by said grantee, its successors and assigns, and upon the further condition that the City shall be saved harmless from any damage arising out of the exercise by said grantee, its successors and assigns, of the rights hereby conferred. The requirement for a bond running to the City of Boulder may be met by the grantee furnishing to the City a certificate, satisfactory to the Director of Finance and Record, showing that a bond in like amount and for the same purposes and conditions as set forth herein has been furnished to a public utility company franchised by the City of Boulder.

Section 13. As a further consideration of this permit or license, and in lieu of all occupation and license taxes or other taxes on the right to do business, the grantee agrees to pay on the 1st day of January annually to the City of Boulder a sum equal to two percent (2%) of its gross revenue derived from the conduct of its business within the corporate limits of the City or $100, whichever is the greater. The City shall have access to the grantee's books and records to verify the amount due the City as reported by the grantee.

Section 14. If any part or parts hereof are for any reason held to be invalid, such shall not affect the remaining portions of this ordinance.

INTRODUCED, READ AND ORDERED PUBLISHED BY TITLE ONLY this 18th day of December A.D. 1979.

/s/ Ruth A. Correll

Mayor

Attest:

/s/ Cappie I. Fine

Director of Finance and Record
Ex-officio City Clerk

READ ON SECOND READING, PASSED AND ADOPTED this 1st day of January, A.D. 1980.

/s/ Ruth A. Correll
Mayor

Attest:

/s/ Cappie I. Fine

Director of Finance and Record
Ex-officio City Clerk

EXHIBIT A

An area described as follows:

A point at which the City limits of the City of Boulder on the West and the Northern boundary line of the National Bureau of Standards property intersect, East along the Northern boundary line of the National Bureau of Standards property to Broadway, North on Broadway to University Avenue, East on University Avenue to 17th Street, North on 17th Street to Canyon Boulevard, West on Canyon Boulevard to 9th Street, North on 9th Street to Spruce Street, West on Spruce Street to the Eastern boundary of Knollwood Village, North along the Eastern boundary of Knollwood Village to the City limits of the City of Boulder on the West, and South along the City limits to the point of beginning, plus any area used for any earth station and any area used for the transmission of signals from any earth station, to the area set forth above.

A map indicating this area is attached to this Exhibit A and incorporated herein.

CANYON BLVD.
FOLSOM
University of Colorado
TABLE MESA DR.
4-10

APPENDIX I

ORDINANCE NO. 4473

AN EMERGENCY ORDINANCE AMENDING ORDINANCE NO. 2846 TO PLACE TEMPORARY GEOGRAPHICAL LIMITATIONS UPON THE GRANTEE; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, the City Council of the City of Boulder granted a revocable permit to Colorado Televents, Inc., in 1964 to conduct the business of a Community Antenna Television System in the City of Boulder; and

WHEREAS, said permit was transferred and assigned to its current holder, Community Communications Company, Inc., a wholly owned subsidiary of Community Tele-Communications, Inc., in 1966; and

WHEREAS, cable television companies have within recent months displayed interest in serving the community and have requested the City Council to grant permission to use the public right-of-way in providing that service; and

WHEREAS, the present permittee, Community Communications Company, Inc., has indicated that it intends to extend its services in the near future to an additional 35 miles of the City of Boulder right-of-way; and

WHEREAS, the City Council finds that such an extension of service by the current permittee would result in hindering the ability of other companies to compete in the Boulder market; and

WHEREAS, the City Council intends to adopt a model cable television permit ordinance, solicit applications from

interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits in a reasonably short time, not to exceed 3 months, and finds that an extension of service by the current permittee would result in a disruption of this application and evaluation process; and

WHEREAS, the City Council finds that placing temporary geographical limitations upon the operations of the current permittee would not impair the present services offered by Community Communications Company, Inc., to City of Boulder residents, and would not impair the ability of the current permittee to improve those services within the area presently served by it.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That Ordinance No. 2846 is hereby amended by the addition of the following sections:

> The City Council intends within a time not to exceed 3 months from the adoption of this ordinance to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits. During the pendency of this application and evaluation process, not to exceed 3 months from the adoption of this ordinance, the grantee's right, permit, license and privilege to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and re-

lated appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder shall be exercised only within the geographical boundaries set forth in Exhibit A, attached to this ordinance and incorporated by reference herein.

It is the intent of this Section 1 that the grantee shall not expand its present system through working in the public right-of-way beyond the geographical areas presently served by the grantee during the effective period of this Section. In addition to any and all of the remedies available to the City, a violation of this Section shall be grounds for immediate revocation of the permit granted in Ordinance No. 2846 and forfeiture of the performance bond referred to therein.

This Section shall expire and be of no effect upon the completion of the application and evaluation process described herein, and in any case no later than March 18, 1980.

Section 2. The City Council finds that initiation of the application and evaluation process described herein is of immediate importance to the residents of Boulder, and that it is necessary to impose a temporary geographical limitation upon the grantee without delay. The City Council finds that an emergency exists, and that this ordinance is necessary for the preservation of the public peace, health, and safety.

Section 3. If any part or parts hereof are for any reason held to be invalid, such shall not affect the remaining portions of this ordinance.

INTRODUCED, READ, PASSED AS AN EMERGENCY MEASURE BY A TWO-THIRDS VOTE, AND ORDERED PUBLISHED IN FULL this 18th day of December A. D. 1979.

/s/ Ruth L. Correll
Mayor

Attest:

/s/ Cappie I. Fine
Director of Finance and Record
Ex-officio City Clerk

STATE OF COLORADO,)
COUNTY OF BOULDER,) ss.
CITY OF BOULDER,)

I, Cappie I. Fine Director of Finance and Record and Ex-Officio City Clerk of said City in the County and State aforesaid, do hereby certify that the foregoing ordinance was introduced and read in full at a regular meeting of the City Council of said City, held on the 18th day of December A. D. 1979, and was on to wit: the 18th day of December A. D. 1979, passed and approved as an emergency ordinance under the City Charter, two-thirds and more of the Councilmen being present and voting in the affirmative. That afterwards, to wit: on the 19th day of December A. D. 1979, I caused the same to be published in full in the official paper of said City (the same being a paper of general circulation published in said City).

Witness my hand and the seal of said City of Boulder, hereto affixed, this 7th day of January A. D. 1980.

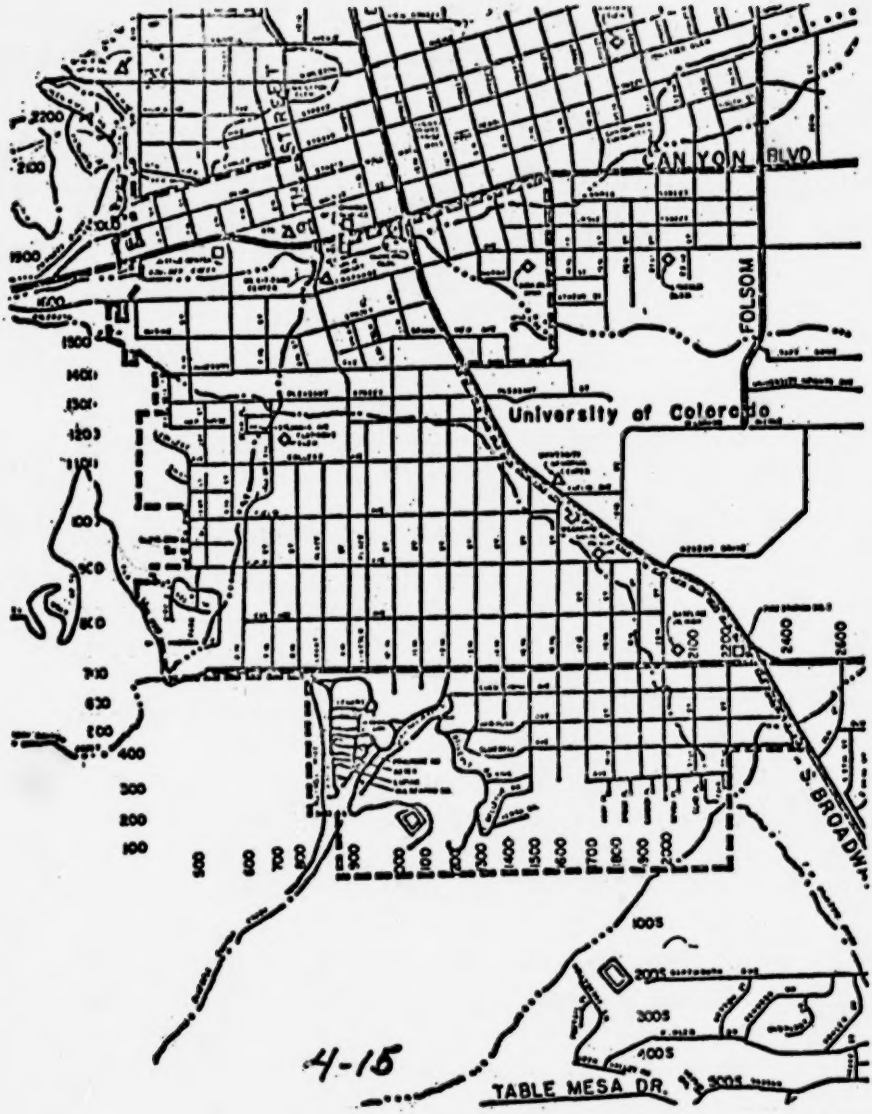
/s/ Cappie I. Fine
Director of Finance and Record,
Ex-Officio City Clerk.

EXHIBIT A

An area described as follows:

A point at which the City limits of the City of Boulder on the West and the Northern boundary line of the National Bureau of Standards property intersect, East along the Northern boundary line of the National Bureau of Standards property to Broadway, North on Broadway to University Avenue, East on University Avenue to 17th Street, North on 17th Street to Canyon Boulevard, West on Canyon Boulevard to 9th Street, North on 9th Street to Spruce Street, West on Spruce Street to the Eastern boundary of Knollwood Village, North along the Eastern boundary of Knollwood Village to the City limits of the City of Boulder on the West, and South along the City limits to the point of beginning, plus any area used for any earth station and any area used for the transmission of signals from any earth station, to the area set forth above.

A map indicating this area is attached to this Exhibit A and incorporated herein.


CANYON BLVD
FOLSOM
University of Colorado
S. BROADWAY
TABLE MESA DR.
4-15

APPENDIX J

ORDINANCE NO. 4515

AN ORDINANCE PARTIALLY REVOKING ORDINANCE NO. 2846 TO PLACE PERMANENT GEOGRAPHICAL LIMITATIONS UPON THE GRANTEE; TO REQUIRE INTERCONNECTION WITH OTHER GRANTEES; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, the City Council of the City of Boulder granted a revocable permit to Colorado Televants, Inc. in 1964 to conduct the business of a community antenna television system in the City of Boulder, pursuant to Section 115 of the Boulder City Charter; and

WHEREAS, said permit was transferred and assigned to its current holder, Community Communications Company, Inc. (the "grantee"), a wholly owned subsidiary of Tele-Communications, Inc., in 1966; and

WHEREAS, the City Council finds that advanced, state-of-the-art cable communications services can and will enhance the quantity and quality of education, news, entertainment, institutional and residential services, cultural opportunities, and opportunities for self-expression available to the public, that such cable communications services can and will promote the convenience of the public and of the commercial and governmental institutions within the City, that such cable communications services may decrease the public's use of energy, and that such cable communications services can and will serve the public interest; and

WHEREAS, the City Council finds that during the past 14 years the grantee has failed and neglected to expand its community antenna television system with reasonable expedition to serve all, or even a major portion, of the citizens of the City, and that it has also failed and neglected to offer advanced, state-of-the-art cable communications services to the citizens of the City; and

WHEREAS, during the past 14 years the City also has received and is aware of complaints from customers of the grantee within the City concerning poor quality television reception, blacking-out of channels and programs, and unresponsiveness of the grantee in addressing and correcting these operational problems; and

WHEREAS, within the past year, various cable communications companies have displayed interest in serving the comunity and have requested the City Council to grant permission to use the public right-of-way in providing that service; and

WHEREAS, during the winter and spring of 1980, the City undertook to enhance the diversity and quality of cable communications services available to the public by conducting an application and selection process for cable communications companies and by offering a permit or permits to construct and operate a cable communications system or systems within the City in direct competition with one another and with the grantee, on terms to be negotiated with the City; and

WHEREAS, each of the cable communications applicants declined such a permit on any terms and requested a permit covering areas within the City from which the

grantee would be excluded from constructing and operating any cable television system; and

WHEREAS, as a matter of policy, the City Council has looked with favor upon direct competition between cable communications companies within the same geographical areas as the most reasonable means of promoting innovative, diversified, and economical cable communications services within the City; and

WHEREAS, the City Council now reluctantly finds that direct competition between cable communications companies within the same geographical areas is not possible now or in the foreseeable future in the City, that the grantee's position in the City has become an entrenched "natural monopoly," and that direct competition is not now or in the foreseeable future a feasible means of promoting innovative, diversified and economical cable communications services within the City; and

WHEREAS, the City Council finds that in the absence of direct competition, innovative, diversified and economical cable communications services can be best promoted within the City by creating the possibility of competition, or at least comparison, between different cable communications companies operating in different areas of the City, by placing permanent geographical restrictions on the grantee, by granting within a reasonably short period of time a permit to a cable communications company other than the grantee to provide service in other areas of the City, and by requiring reasonable interconnection between the systems of the community antenna television and cable communications companies within the City; and

WHEREAS, the City Council intends within a reasonably short period of time to conduct and complete an additional process of soliciting applications from interested cable communications companies, evaluating such applications, and granting a permit to another company to provide cable communications services in areas primarily outside those areas which are and may be served by the grantee; and

WHEREAS, in order to avoid any assertion that the City is acting in a proprietary capacity in undertaking what the City Council deems to be the essential governmental objective of districting the City, the City will set the franchise fee for any new cable communications company granted a permit in the City at the same level as that paid by the grantee, through the expiration of the grantee's permit in 1984; and

WHEREAS, the City Council finds that it is in the public interest to initiate such a process in an expeditious manner; and

WHEREAS, the City Council finds that during the winter and the spring of 1980, the grantee has constructed and expanded parts of its community antenna television system in the City; and

WHEREAS, the City Council finds that at times during the winter of 1980, the grantee constructed and expanded parts of its community antenna television system in the City in violation of Ordinances 4472 and 4473 (1979); and

WHEREAS, the grantee has indicated to the City that it intends to continue to expand and construct parts of its

community antenna television system in the City, absent legislative action by the City Council; and

WHEREAS, the City Council finds that continued construction and expansion of parts of the grantee's community antenna television system in the City will substantially disrupt and impede the process of soliciting applications from other interested cable communications companies, evaluating such applications, and granting a permit to a company other than the grantee to provide cable communications services in a part of the City; and

WHEREAS, the City Council finds that placing permanent geographical restrictions upon the operations of the grantee will minimize, if not eliminate, such disruption; and

WHEREAS, the City Council finds that placing permanent geographical limitations upon the operations of the grantee will not impair the present services offered by the grantee to City residents; and

WHEREAS, the City Council finds that placing permanent geographical limitations upon the operations of the grantee will not impede its ability to expand its community antenna television services to numerous customers in addition to those it now serves, nor will it impede the grantee's ability to offer innovative, economical, state-of-the-art services to all its customers; and

WHEREAS, the City Council finds that the area set forth in Exhibit A, attached to this Ordinance and incorporated by reference herein, is a viable market area which allows for the development and operation of a profitable community antenna television system by the grantee; and

WHEREAS, the grantee may continue to operate in the area specified in Exhibit A without any further condition, except for the terms of its original permit and the additional requirement of interconnection with other cable communications companies operating in the City; and

WHEREAS, the grantee has asserted that any limitation on its expansion in the City would violate the First Amendment to the United States Constitution; and

WHEREAS, the City Council rejects such assertion, finding that the expansion of the grantee's community antenna television system is not protected activity, that the grantee's assertion of First Amendment protection is an overbroad attempt to further entrench its monopoly position by requiring that the grantee's permit be maintained and renewed *ad infinitum* despite the absence of any prospect for direct competition from other cable communications companies now or in the foreseeable future, and that the paramount First Amendment rights of the inhabitants of the City require that the City take action to assure a diverse market place of ideas by districting the City; and

WHEREAS, the City Council finds that it is in the public interest to place permanent geographical limitations upon the operations of the grantee, to partially revoke Ordinance No. 2846, to grant within a reasonably short period of time a permit to an additional company to provide cable communications services in other areas of the City, and to require reasonable interconnection between the systems of the community antenna television and cable communications companies within the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That the revocable permit granted under Ordinance No. 2846 to Colorado Televents, Inc. and its assignee, Community Communications Company, Inc., to conduct the business of a community antenna television system in the City of Boulder is hereby partially revoked, as hereinafter provided.

Section 2. That Ordinance No. 2846 is hereby amended by the addition of the following:

> The grantee's right, permit, license and privilege to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder shall be exercised only within the geographical boundaries set forth in Exhibit A, attached to this ordinance and incorporated by reference herein.
>
> In addition to any and all of the remedies available to the City, a violation of this Section shall be grounds for immediate revocation of the permit granted in Ordinance No. 2846 and forfeiture of the performance bond referred to therein.
>
> The right, permit and privilege herein granted is subject to such reasonable requirements as the City Council may subsequently adopt concerning inter-

connection with other cable systems in the City of Boulder.

Section 3. If any part or parts hereof are for any reason held to be invalid, such shall not affect the remaining portions of this ordinance.

INTRODUCED, READ AND ORDERED PUBLISHED IN FULL this 1st day of July A. D. 1980.

/s/ Ruth A. Correll
Mayor

Attest:

/s/ Cappie I. Fine
Director of Finance and Record
Ex-officio City Clerk

READ ON SECOND READING, PASSED, ADOPTED AND ORDERED PUBLISHED BY TITLE ONLY this 22nd day of July, A. D. 1980.

/s/ Ruth A. Correll
Mayor

Attest:

/s/ Cappie I. Fine
Director of Finance and Record
Ex-officio City Clerk

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

—against—

COLUMBIA PICTURES INDUSTRIES, INC.; GETTY OIL COMPANY; MCA, INC.; PARAMOUNT PICTURES CORPORATION; and TWENTIETH CENTURY-FOX FILM CORPORATION,
Defendants,

—and—

PREMIERE,
Intervenor-Defendant.

OPINION

APPEARANCES:

UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
Attorneys for Plaintiff
Washington, D. C. 20530

By: Seymour H. Dussman, Esq.
Gordon B. Stoner, Esq.
Karen Magid, Esq.
Elisabeth P. Hyde, Esq.
Stanley M. Gorinson, Esq.
Robert E. Hauberg, Jr., Esq.
Of Counsel

SIMPSON, THACHER & BARTLETT
Attorneys for Defendant
Paramount Pictures Corporation
One Battery Park Plaza
New York, New York 10004

By: Roy L. Reardon, Esq.
Charles E. Koob, Esq.
Nicholas M. Cannella, Esq.
Of Counsel

FOOTNOTES

* * *

2 A satellite company has recently announced its intention to transmit pay television signals directly to subscribers' homes by having them equipped with their own dish-shaped antennas functioning as a simplified earth station. Satellite Week, Dec. 22, 1980, at 1.

3 Such a system negotiates directly with suppliers of individual programming or with brokers.

4 In the last two years, franchises have been granted in ten major metropolitan markets, including Dallas, Pittsburgh, Houston, Cincinnati, Oklahoma City, Kansas City, and the twin cities of Minneapolis and St. Paul.

* * *

and thus the enormous cost of installing cable systems avoided, even greater growth of pay television can be expected.[2]

At the present time, approximately 31 million of the 77 million television households in the United States have cable service available to them. (The phrase used in the industry is "homes passed.") Of these, more than half (*i. e.*, 17.2 million) are basic cable subscribers. Of the basic cable subscribers, almost half, 8.3 million, receive pay television.

Most of the cable operators serving these subscribers are affiliated with one or another network program service, although it is still possible for an individual cable operator to program its pay television channel as a "stand alone."[3] However, there are financial and technical disadvantages to operating individually. The equipment needed to program on a "stand alone" basis is more expensive and more personnel are needed to operate it. Moreover (surprisingly), the satellite-distributed network signal provides a higher quality picture than those transmitted from independent stations using cassettes or disks.

Pay television has grown significantly since its inception in 1972. By 1985, it is estimated that there will be between 16 million and 25 million households subscribing to pay television. Billions of dollars annually will be spent on pay television. So popular is the service that it has promoted the growth of cable systems in major metropolitan areas.[4]